

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

<i>In the Matter of</i>)	
)	
Petition of Dental Solutions, Inc.)	
D/B/A Hogan Dental Laboratory)	CG Docket No. 05–338
for Retroactive Waiver of)	
47 C.F.R. § 64.1200(a)(4)(iv))	

**PETITION FOR RETROACTIVE WAIVER BY
DENTAL SOLUTIONS, INC. D/B/A HOGAN DENTAL LABORATORY**

Date: December 31, 2014

DENTAL SOLUTIONS, INC. D/B/A
HOGAN DENTAL LABORATORY

By: /s/ Suyash Agrawal

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PETITION FOR RETROACTIVE WAIVER

Pursuant to 47 C.F.R. § 1.3, Dental Solutions, Inc. D/B/A Hogan Dental Laboratory (“Hogan Dental Lab” or “Petitioner”)¹ through its attorneys, respectfully requests that the Federal Communication Commission (“FCC” or “Commission”) grant a retroactive waiver of liability with respect to any facsimile advertisements sent by Petitioner with the prior express invitation or permission of the recipients or their agents, but which did not contain the opt-out notice required under 47 C.F.R. § 64.1200(a)(4)(iv).

INTRODUCTION

Petitioner fabricates fixed dental restorations, such as crowns and bridges. Petitioner works directly with dentists, who are its sole customers.

Petitioner and two of its shareholders are defendants in a putative class action lawsuit in the Northern District of Illinois for allegedly sending unsolicited fax advertisements in violation of the Telephone Consumer Protection Act (“TCPA”). The complaint asserts a private right of action under the TCPA as well as numerous state law claims. *See Clemens v. Bhatti*, Case No.

¹ Hogan Dental Lab’s shareholders, Tripat K. Grewal and Gagandeep S. Bhatti, join in this petition.

1:14-CV-09001 (N.D. Ill.) (“*Bhatti* litigation”). (Complaint filed Nov. 10, 2014 attached hereto as Ex. A.)

Although formal discovery has not yet commenced, Petitioner asserts that many of the faxes at issue in the *Bhatti* litigation were in fact *solicited*, rather than unsolicited. To that end, Petitioner fully intends to raise the affirmative defense of consent in that action. Significantly for purposes of this Petition, however, the plaintiff in the *Bhatti* litigation has asserted that the affirmative defense of consent is “conditioned upon the provision of an opt-out notice that complies with the TCPA” (Ex. A. ¶ 17), and that Petitioner did not provide any such notice. (*Id.* ¶ 15.) In other words, the plaintiff contends that Petitioner may not raise (or prove) the affirmative defense of consent because it allegedly failed to include the opt-out notice required by the TCPA.

The FCC has recently acknowledged, however, that there was reasonable uncertainty as to senders’ obligation under the TCPA to include opt-out notices on solicited faxes. In an order released on October 30, 2014 (the “October 2014 Order”), the Commission acknowledged that a previous order regarding the requirement that opt-out notices be provided on solicited advertisements was confusing, and thus granted numerous retroactive waivers to certain senders of fax ads.² Specifically, the waivers provided “temporary relief from any past obligation to provide the opt-out notice to [recipients who previously consented to receive fax ads].”³ The FCC’s October 2014 Order invited similarly situated parties to seek retroactive waivers, as well.⁴

² CG Docket Nos. 02–278, 05–338, FCC 14-164 (rel. October 30, 2014) ¶ 24 (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, *Junk Fax Prevention Act of 2005*, CG Docket Nos. 02–278, 05–338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006)).

³ *Id.* ¶ 1.

⁴ *Id.* ¶ 2.

As explained more fully below, Petitioner is similarly situated in all material respects to those parties who have already received waivers in that Petitioner is potentially subject to a significant damage award on the basis of an FCC order that the Commission has already found engendered significant uncertainty and confusion. Accordingly, pursuant to the Commission's October 2014 Order and 47 C.F.R. § 1.3, Petitioner respectfully seeks a retroactive waiver of 42 C.F.R. § 64.1200(a)(4)(iv) for all faxes previously sent by Petitioner or on its behalf for which it had obtained the recipient's consent.⁵

ARGUMENT

A waiver of the Commission's rules may be granted for good cause shown – that is, if, (1) special circumstances warrant a deviation from the general rule, and (2) the waiver would better serve the public interest than would application of the rule.⁶ In its October 2014 Order granting retroactive waivers of the opt-out notice requirement, the Commission concluded that both of these conditions were satisfied.

First, the Commission found that the confusion surrounding the applicability of the opt-out requirement to solicited fax ads constituted “special circumstances” that warrant a deviation from the general rule.⁷ Second, the Commission found that this confusion potentially subjected numerous senders to significant damage awards, and that therefore waiver served the public

⁵ Significantly, granting the requested waiver would not resolve any factual issues in the *Bhatti* litigation, including whether the faxes at issue in that case were solicited or unsolicited. *See id.* ¶ 31. Rather, the waiver would simply relieve Petitioners of any past obligation to provide the opt-out notice to recipients who consented to receive fax ads.

⁶ *Id.* ¶ 23 nn.82–83 (citing, *inter alia*, 47 C.F.R. § 1.3; *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)); *see also* 47 C.F.R. § 1.925(b)(3)(i)–(ii) (the Commission may grant a waiver where the underlying purpose of the rule(s) would not be served or the factual circumstances would render application of the rule inequitable, unduly burdensome or contrary to the public interest).

⁷ October 2014 Order ¶¶ 24–26.

interest better than application of the rule.⁸ These findings apply with equal force to Petitioner, and therefore good cause exists to grant a retroactive waiver in this case, as well.

A. Special Circumstances Warrant Deviation From The Rule Because The FCC’s Prior Orders Caused Confusion Regarding The Opt-Out Notice Requirement for Solicited Fax Ads.

As chronicled in the Commission’s October 2014 Order, confusion surrounding the opt-out notice requirement for solicited fax ads arose from two sources: (1) a footnote in a 2006 FCC order providing that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements,”⁹ and (2) a lack of explicit notice that the Commission was contemplating an opt-out requirement on fax ads sent with the prior express permission of the recipient.¹⁰ With respect to the footnote in particular, the FCC found that “[t]he use of the word ‘unsolicited’ ... may have caused some parties to misconstrue the Commission’s intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient,” and “caused confusion or misplaced confidence regarding the applicability of this [opt-out notice] requirement to faxes sent to those recipients who provided prior express permission.”¹¹ The FCC concluded that the confusion caused by the footnote, combined with the aforementioned lack of explicit notice, constituted special circumstances that warranted deviation from Section 64.1200(a)(4)(iv).¹²

⁸ *Id.* ¶ 27.

⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02–278, 05–338, Report and Order and Third Order on Reconsideration (2006) (“Junk Fax Order”), 21 FCC Rcd 3810, n.154 (emphasis added).

¹⁰ October 2014 Order ¶ 25.

¹¹ *Id.* ¶ 24.

¹² *Id.* ¶ 26.

The circumstances of this case are identical in all material respects to those presented in the 2014 October Order. Indeed, there is “nothing in the record here demonstrating that the [P]etitioner understood that [it] did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to do so.”¹³ Accordingly, a finding of “special circumstances” is warranted here, as well.

B. A Retroactive Waiver Would Better Serve the Public Interest Than Would Inflexible Application of the Rule.

Granting a retroactive waiver to Petitioner would also serve the public interest. As the Commission noted in its October 2014 Order, the lack of explicit notice and the contradictory footnote from the FCC’s 2006 order “resulted in a confusing situation for businesses or one that caused businesses to mistakenly believe that the opt-out notice requirement did not apply,” leaving certain businesses potentially subject to significant damage awards under the TCPA.¹⁴ The FCC determined that, on balance, it served the public interest to grant retroactive waivers of Section 64.1200(a)(4)(iv) to ensure that any such confusion did not result in inadvertent violations of the opt-out requirement for solicited fax ads.¹⁵

Here, too, the public interest is best served by granting a retroactive waiver to Petitioner. Petitioner is currently a defendant in a putative class action that will potentially subject it to significant attorneys’ fees, litigation expenses, and enormous penalties. Moreover, Petitioner has already taken measures to ensure future compliance with Section 64.1200(a)(4)(iv).

¹³ *Id.*

¹⁴ *Id.* ¶ 27.

¹⁵ *Id.*

CONCLUSION

Simply put, Petitioner is similarly situated in all material respects to those entities who received waivers in the Commission's October 2014 Order. In light of the confusion over the Commission's rules concerning the provision of opt-out notices for solicited fax ads, and Petitioner's potentially enormous liability relating to its sending of solicited fax ads, the public interest is best served by granting a retroactive waiver to Petitioner.

Petitioner therefore respectfully requests a retroactive waiver from liability with respect to any facsimile advertisements sent by Petitioner with the prior express invitation or permission of the recipients or their agents, but which did not contain the opt-out notice required under 47 C.F.R. § 64.1200(a)(4)(iv).

Date: December 31, 2014

Respectfully submitted,

DENTAL SOLUTIONS, INC. D/B/A
HOGAN DENTAL LABORATORY

By: /s/ Suyash Agrawal

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EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

GARY R. CLEMENS, D.D.S.,)	
on behalf of plaintiff and a class,)	
)	
Plaintiff,)	
)	
v.)	
)	
GAGANDEEP BHATTI doing business as)	
HOGAN DENTAL LABORATORY, INC.,)	
and JOHN DOES 1-10,)	
)	
Defendants.)	

COMPLAINT – CLASS ACTION

MATTERS COMMON TO MULTIPLE COUNTS

INTRODUCTION

1. Plaintiff Gary R. Clemens, D.D.S. (“Clemens”) brings this action to secure redress for the actions of defendant Gagandeep Bhatti, doing business as Hogan Dental Laboratory, Inc. (“Bhatti”), in sending or causing the sending of unlawful advertisements to telephone facsimile machines in violation of the Telephone Consumer Protection Act, 47 U.S.C. §227 (“TCPA”), the Illinois Consumer Fraud Act, 815 ILCS 505/2 (“ICFA”), and the common law.

PARTIES

2. Plaintiff Clemens is an individual with offices at 3340 South Oak Park, Suite 301, Berwyn, IL 60402, where he maintains telephone facsimile equipment.

3. Defendant Bhatti is an individual at 7602 Talbert Avenue, Suite E, Huntington Beach, California 92648. Hogan Dental Laboratory, Inc. was once a corporation, but forfeited its

charter in 2005, after which Bhatti continued to conduct the business.

4. Defendants John Does 1-10 are other natural or artificial persons that were involved in the sending of the facsimile advertisements described below. Plaintiff does not know who they are.

JURISDICTION AND VENUE

5. This Court has jurisdiction under 28 U.S.C. §§1331 and 1367. *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 751-53 (2012); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005).

6. Personal jurisdiction exists under 735 ILCS 5/2-209, in that defendant:
- a. Has committed tortious acts in Illinois by causing the transmission of unlawful communications into the state.
 - b. Has transacted business in Illinois.
7. Venue in this District is proper for the same reason.

FACTS

8. On July 12, 2013, Clemens received the unsolicited fax advertisement attached as Exhibit A on its facsimile machine.

9. Discovery may reveal the transmission of additional faxes as well.
10. Bhatti is responsible for sending or causing the sending of the fax.
11. Bhatti, as the entity whose products or services were advertised in the fax, derived economic benefit from the sending of the fax.
12. Bhatti either negligently or wilfully violated the rights of plaintiff and other recipients in sending the faxes.

13. The fax refers to a website used by Bhatti.
14. Plaintiff had no prior relationship with defendant and had not authorized the sending of fax advertisements to plaintiff.
15. The fax does not contain an opt out notice as described by 47 U.S.C. §227.
16. The TCPA makes unlawful the “use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine ...” 47 U.S.C. §227(b)(1)(C).
17. The TCPA provides for affirmative defenses of consent or an established business relationship. Both defenses are conditioned on the provision of an opt out notice that complies with the TCPA. *Holtzman v. Turza*, 728 F.3d 682 (7th Cir. 2013); *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013).
18. On information and belief, the fax attached hereto was sent as part of a mass broadcasting of faxes.
19. On information and belief, defendant has transmitted similar unsolicited fax advertisements to at least 40 other persons in Illinois.
20. There is no reasonable means for plaintiff or other recipients of defendant’s unsolicited advertising faxes to avoid receiving illegal faxes. Fax machines must be left on and ready to receive the urgent communications authorized by their owners.

COUNT I – TCPA

21. Plaintiff incorporates ¶¶ 1-20.
22. The TCPA, 47 U.S.C. §227(b)(3), provides:

Private right of action.

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the Court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the subparagraph (B) of this paragraph.

23. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes, in the form of paper and ink or toner consumed as a result. Furthermore, plaintiff's statutory right of privacy was invaded.

24. Plaintiff and each class member is entitled to statutory damages.

25. Defendant violated the TCPA even if its actions were only negligent.

26. Defendant should be enjoined from committing similar violations in the future.

CLASS ALLEGATIONS

27. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of class, consisting of (a) all persons (b) who, on or after a date four years prior to the filing of this action (28 U.S.C. §1658), (c) were sent faxes by or on behalf of defendant Bhatti promoting his goods or services for sale (d) and with respect to whom defendant cannot provide evidence of express consent or an established business relationship prior to the faxing.

28. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

29. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. The manner in which defendant compiled or obtained its list of fax numbers;
- c. Whether defendant thereby violated the TCPA;
- d. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- e. Whether defendant thereby converted the property of plaintiff.
- f. Whether defendant thereby created a private nuisance.
- g. Whether defendant thereby committed a trespass to chattels.

30. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

31. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

32. A class action is the superior method for the fair and efficient adjudication of this

controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

33. Several courts have certified class actions under the TCPA. *Holtzman v. Turza*, 08 C 2014, 2009 U.S. Dist. LEXIS 95620 (N.D.Ill., Oct. 14, 2009), *aff'd* in relevant part, 728 F.3d 682 (7th Cir. 2013); *Sadowski v. Med1 Online, LLC*, 07 C 2973, 2008 U.S. Dist. LEXIS 41766 (N.D.Ill., May 27, 2008); *CE Design Ltd. v Cy's Crabhouse North, Inc.*, 259 F.R.D. 135 (N.D.Ill. 2009); *Targin Sign Sys. v Preferred Chiropractic Ctr., Ltd.*, 679 F. Supp. 2d 894 (N.D.Ill. 2010); *Garrett v. Ragle Dental Lab, Inc.*, 10 C 1315, 2010 U.S. Dist. LEXIS 108339, 2010 WL 4074379 (N.D.Ill., Oct. 12, 2010); *Hinman v. M & M Rental Ctr.*, 545 F.Supp. 2d 802 (N.D.Ill. 2008); *Clearbrook v. Rooflifters, LLC*, 08 C 3276, 2010 U.S. Dist. LEXIS 72902 (N.D. Ill. July 20, 2010) (Cox, M.J.); *G.M. Sign, Inc. v. Group C Communs., Inc.*, 08 C 4521, 2010 U.S. Dist. LEXIS 17843 (N.D. Ill. Feb. 25, 2010); *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642 (W.D.Wash. 2007); *Display South, Inc. v. Express Computer Supply, Inc.*, 961 So.2d 451, 455 (La. App. 1st Cir. 2007); *Display South, Inc. v. Graphics House Sports Promotions, Inc.*, 992 So. 2d 510 (La. App. 1st Cir. 2008); *Lampkin v. GGH, Inc.*, 146 P.3d 847 (Ok. App. 2006); *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. (App.) 94, 50 P.3d 844 (2002); *Core Funding Group, LLC v. Young*, 792 N.E.2d 547 (Ind.App. 2003); *Critchfield Physical Therapy v. Taranto Group, Inc.*, 293 Kan. 285; 263 P.3d 767 (2011); *Karen S. Little, L.L.C. v. Drury Inns, Inc.*, 306 S.W.3d 577 (Mo. App. 2010).

34. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Actual damages;
- b. Statutory damages;
- c. An injunction against the further transmission of unsolicited fax advertising;
- d. Costs of suit;
- e. Such other or further relief as the Court deems just and proper.

COUNT II – ILLINOIS CONSUMER FRAUD ACT

35. Plaintiff incorporates ¶¶ 1-20.
 36. Defendant engaged in unfair acts and practices, in violation of ICFA § 2, 815 ILCS 505/2, by sending unsolicited fax advertising to plaintiff and others.
 37. Unsolicited fax advertising is contrary to the TCPA and also Illinois law. 720 ILCS 5/26-3(b) makes it a petty offense to transmit unsolicited fax advertisements to Illinois residents.
 38. Defendant engaged in an unfair practice by engaging in conduct that is contrary to public policy, unscrupulous, and caused injury to recipients of their advertising.
 39. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes, in the form of paper and ink or toner consumed as a result.
 40. Defendant engaged in such conduct in the course of trade and commerce.
 41. Defendant's conduct caused recipients of their advertising to bear the cost thereof.
- This gave defendant an unfair competitive advantage over businesses that advertise lawfully,

such as by direct mail. For example, an advertising campaign targeting one million recipients would cost \$500,000 if sent by U.S. mail but only \$20,000 if done by fax broadcasting. The reason is that instead of spending \$480,000 on printing and mailing his ad, the fax broadcaster misappropriates the recipients' paper and ink. "Receiving a junk fax is like getting junk mail with the postage due". Remarks of Cong. Edward Markey, 135 Cong Rec E 2549, Tuesday, July 18, 1989, 101st Cong. 1st Sess.

42. Defendant's shifting of advertising costs to plaintiff and the class members in this manner makes such practice unfair. In addition, defendant's conduct was contrary to public policy, as established by the TCPA and Illinois statutory and common law.

43. Defendant should be enjoined from committing similar violations in the future.

CLASS ALLEGATIONS

44. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons with Illinois fax numbers (b) who, on or after a date three years prior to the filing of this action, (c) were sent faxes by or on behalf of defendant Bhatti promoting his goods or services for sale (d) and with respect to whom defendant cannot provide evidence of express consent or an established business relationship prior to the faxing.

45. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

46. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax

advertisements;

- b. Whether defendant thereby violated the TCPA;
- c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendant thereby converted the property of plaintiff.
- e. Whether defendant thereby created a private nuisance.
- f. Whether defendant thereby committed a trespass to chattels.

47. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

48. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

49. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

50. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Appropriate damages;

- b. An injunction against the further transmission of unsolicited fax advertising;
- c. Attorney's fees, litigation expenses and costs of suit;
- d. Such other or further relief as the Court deems just and proper.

COUNT III – CONVERSION

- 51. Plaintiff incorporates ¶¶ 1-20.
- 52. By sending plaintiff and the class members unsolicited faxes, defendant converted to its own use ink or toner and paper belonging to plaintiff and the class members.
- 53. Immediately prior to the sending of the unsolicited faxes, plaintiff and the class members owned and had an unqualified and immediate right to the possession of the paper and ink or toner used to print the faxes.
- 54. By sending the unsolicited faxes, defendant appropriated to its own use the paper and ink or toner used to print the faxes and used them in such manner as to make them unusable. Such appropriation was wrongful and without authorization.
- 55. Defendant knew or should have known that such appropriation of the paper and ink or toner was wrongful and without authorization.
- 56. Plaintiff and the class members were deprived of the paper and ink or toner, which could no longer be used for any other purpose. Plaintiff and each class member thereby suffered damages as a result of receipt of the unsolicited faxes.
- 57. Defendant should be enjoined from committing similar violations in the future.

CLASS ALLEGATIONS

- 58. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a

class, consisting of (a) all persons with Illinois fax numbers (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendant Bhatti promoting his goods or services for (d) and with respect to whom defendant cannot provide evidence of express consent or an established business relationship prior to the faxing.

59. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

60. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. Whether defendant thereby violated the TCPA;
- c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendant thereby converted the property of plaintiff.
- e. Whether defendant thereby created a private nuisance.
- f. Whether defendant thereby committed a trespass to chattels.

61. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

62. Plaintiff's claims are typical of the claims of the class members. All are

based on the same factual and legal theories.

63. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

64. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unsolicited fax advertising;
- c. Costs of suit;
- d. Such other or further relief as the Court deems just and proper.

COUNT IV – PRIVATE NUISANCE

65. Plaintiff incorporates ¶¶ 1-20.

66. Defendant's sending plaintiff and the class members unsolicited faxes was an unreasonable invasion of the property of plaintiff and the class members and constitutes a private nuisance.

67. Congress determined, in enacting the TCPA, that the prohibited conduct was a "nuisance." *Universal Underwriters Ins. Co. v. Lou Fusz Automotive Network, Inc.*, 401 F.3d 876, 882 (8th Cir. 2005).

68. Defendant acted either intentionally or negligently in creating the nuisance.

69. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes.

70. Defendant should be enjoined from continuing its nuisance.

CLASS ALLEGATIONS

71. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons, (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendant Bhatti promoting his goods or services for sale (d) and with respect to whom defendant cannot provide evidence of express consent or an established business relationship prior to the faxing.

72. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

73. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. Whether defendant thereby violated the TCPA;
- c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendant thereby converted the property of plaintiff.
- e. Whether defendant thereby created a private nuisance.

f. Whether defendant thereby committed a trespass to chattels.

74. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

75. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

76. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

77. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unsolicited fax advertising;
- c. Costs of suit;
- d. Such other or further relief as the Court deems just and proper.

COUNT V – TRESPASS TO CHATTELS

78. Plaintiff incorporates ¶¶ 1-20.

79. Plaintiff and the class members were entitled to possession of the equipment they used to receive faxes.

80. Defendant's sending plaintiff and the class members unsolicited faxes interfered with their use of the receiving equipment and constitutes a trespass to such equipment. *Chair King v. Houston Cellular*, 95cv1066, 1995 WL 1693093 at *2 (S.D. Tex. Nov. 7, 1995) (denying a motion to dismiss with respect to plaintiff's trespass to chattels claim for unsolicited faxes), vacated on jurisdictional grounds 131 F.3d 507 (5th Cir. 1997).

81. Defendant acted either intentionally or negligently in engaging in such conduct.

82. Plaintiff and each class member suffered damages as a result of receipt of the unsolicited faxes.

83. Defendant should be enjoined from continuing trespasses.

CLASS ALLEGATIONS

84. Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff brings this claim on behalf of a class, consisting of (a) all persons with Illinois fax numbers (b) who, on or after a date five years prior to the filing of this action, (c) were sent faxes by or on behalf of defendant Bhatti promoting his goods or services for sale (d) and with respect to whom defendant cannot provide evidence of express consent or an established business relationship prior to the faxing.

85. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief that there are more than 40 members of the class.

86. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. Whether defendant thereby violated the TCPA;
- c. Whether defendant thereby engaged in unfair acts and practices, in violation of the ICFA.
- d. Whether defendant thereby converted the property of plaintiff.
- e. Whether defendant thereby created a private nuisance.
- f. Whether defendant thereby committed a trespass to chattels.

87. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

88. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

89. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

90. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g. for securities fraud.

WHEREFORE, plaintiff requests that the Court enter judgment in favor of plaintiff and the class and against defendant for:

- a. Appropriate damages;
- b. An injunction against the further transmission of unsolicited fax advertising;
- c. Costs of suit;
- d. Such other or further relief as the Court deems just and proper.

/s/ Daniel A. Edelman
Daniel A. Edelman

Daniel A. Edelman
Cathleen M. Combs
James O. Lattuner
Dulijaza Clark
EDELMAN, COMBS, LATTURNER & GOODWIN, LLC
20 South Clark Street, Suite 1500
Chicago, Illinois 60603
(312) 739-4200
(312) 419-0379 (FAX)

NOTICE OF LIEN AND ASSIGNMENT

Please be advised that we claim a lien upon any recovery herein for 1/3 or such amount as a court awards. All rights relating to attorney's fees have been assigned to counsel.

/s/ Daniel A. Edelman
Daniel A. Edelman

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EXHIBIT A



Hogan Dental Laboratory
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Email: contact@hogandentallab.com
www.hogandentallab.com

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Sincerely,
John Potzler
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